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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

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11 MAFFICK LLC, a Delaware limited liability
company,

12 Plaintiff,

13 v.

14 FACEBOOK, INC., a Delaware corporation,
15 and DOES 1-10, inclusive,

16 Defendants.

17 Case No. 3:20-cv-05222-JD

18 PLAINTIFF MAFFICK, LLC'S OPPOSITION
TO FACEBOOK'S MOTION TO STAY
DISCOVERY AND CONTINUE THE TRIAL
DATE

19 Assigned to: Hon. James Donato

20 Hearing Date: November 19, 2020

21 Time: 10:00 a.m.

1
2 Plaintiff Maffick LLC (“Maffick”) respectfully submits this opposition to the motion
3 by Facebook, Inc. (“Facebook”) to stay discovery and to continue the trial date in this
4 matter.

5 **I. BACKGROUND**

6 This case raises issues of critical importance to Maffick. As the Court is aware, Facebook
7 attaches a label that falsely identifies Maffick as “Russia State-Controlled Media” (the “Notice”)
8 every day to every post on all three of Maffick’s social media pages – “In the Now,” Soapbox,” and
9 “Waste-Ed.” In connection with its TRO application, Maffick presented evidence to this Court
10 demonstrating that the monetization of its social media pages dropped roughly 85% and its reach
11 (*i.e.*, the number of views of its social media content) dropped over 70% in the first month after
12 Facebook began regularly publishing the Notice.

13 Facebook’s false Notice is not the first time it targeted Maffick with false assertions about it
14 being editorially controlled by the Russian government. Earlier this year, Facebook threatened to
15 shut down all of Maffick’s social media pages (and Anissa Naouai’s personal page) within four
16 days, unless Maffick posted a statement that it was a “brand of Maffick Media, which is owned and
17 operated by Ruptly GmbH, a subsidiary of RT news.” Maffick is not a brand of Maffick Media,
18 which is a defunct German company that no longer does business of any kind, and is not owned or
19 operated by either Ruptly or RT. Maffick repeatedly attempted to contact Facebook to inform them
20 that posting the requested language would require them to publish misinformation, but Facebook
21 never responded. Ultimately, Maffick posted the phrase “Affiliated with RT” in the “About”
22 section of “Soapbox”’s Facebook and Instagram accounts, as a temporary stop-gap measure so that
23 Facebook would not carry out its threat to shut down all of Maffick’s pages. It did not make a
24 similar posting on its other channels, “In the Now” (which has the overwhelming majority of
25 Maffick’s social media followers) or “Waste-Ed.” Roughly two weeks later, before Maffick could
26 take further action to clarify that is not owned or controlled, editorially or otherwise, by any
27 Russian state entity or official, Facebook began publishing the Notice.
28

1 Maffick brought this case because its efforts to demonstrate to Facebook that it is an
 2 independent editorial operation and not “Russia State-Controlled Media” have fallen on deaf ears
 3 and because the Notice has had devastating effects on its business. Maffick sought a neutral arbiter
 4 and a prompt decision, confident that, given the opportunity to present a full factual record at trial,
 5 the jury will find that Maffick is not editorially controlled by the Russian government and that the
 6 Notice is false and should be taken down. This Court’s decision to set an early trial date in this
 7 matter facilitated the rapid resolution that Maffick seeks.

8 **II. ARGUMENT**

9 Facebook’s motion to stay discovery and continue the trial date delays progress in the
 10 litigation and ultimately the resolution of Maffick’s claims. To the extent Facebook premises its
 11 motion on the arguments raised in its pending motions to strike and dismiss – *i.e.*, that the Notice is
 12 a non-verifiable statement of opinion; that the Notice is not commercial speech and therefore
 13 cannot support a Lanham Act claim; that Maffick is obligated to plead actual malice and has not
 14 sufficiently done so; or that Maffick’s tortious interference claims are insufficient – those
 15 arguments provide no basis for the requested stay or continuance. The Court did not focus its
 16 questioning on those arguments at the hearing on Facebook’s motions and, as Maffick argued in its
 17 opposition to Facebook’s motions, those arguments are either meritless or require discovery and the
 18 presentation of a full factual record before they can be resolved on the merits. Accordingly,
 19 Facebook’s motion should be denied to the extent it is based on the arguments it raised in its
 20 motions.

21 Maffick recognizes that the Court *sua sponte* raised questions about whether Maffick had
 22 pled the elements of its claims under Sections 43(a)(1)(A) and (a)(1)(B) of the Lanham Act. As
 23 Maffick explained at the hearing, its allegations satisfy the elements of both claims. With respect
 24 to Section 43(a)(1)(A), by stating to the public that Maffick is “Russia state-controlled media,”
 25 which Facebook says means that Maffick is under the editorial control of the Russian government,
 26 Facebook made a false representation of fact. Facebook also falsely represented that the Facebook
 27 criteria support the conclusion that Maffick is “Russia state-controlled media,” when they actually
 28 point to the opposite conclusion. Facebook’s false factual representations are likely to cause

1 confusion about the origin or sponsorship of aspects of Facebook's social media service. They are
 2 likely to create confusion about whether pages Facebook publishes on its social media platform
 3 originate with, or are sponsored or approved by, the Russian government. That constitutes an
 4 actionable claim under Section 43(a)(1)(A).

5 Similarly, by falsely labeling Maffick as "Russia state-controlled media" as part of a
 6 promotional campaign intended to promote Facebook's image as a responsible social media
 7 company that is addressing its users and advertisers' concerns over election interference, Facebook
 8 also violates Section 43(a)(1)(B) of the Lanham Act, which prohibits statements "in... promotion
 9 [that] misrepresent[] the nature, characteristics, qualities, or geographic origin of his or her or
 10 another person's... commercial activities[.]". 15 U.S.C. § 1125(a)(1)(B).

11 Maffick's Section 43(a) claim also falls within the broad ambit of unfair competition
 12 prohibited by the statute. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 570 U.S. 118,
 13 131 (2014) (noting that the Lanham Act provides that one of its purposes is "to protect persons
 14 engaged in... commerce against unfair competition") (quoting 15 U.S.C. §1127). In *Lexmark*, the
 15 Court held that to come within the zone of interests for a claim under Section 43(a), "a plaintiff
 16 must allege an injury to a commercial interest in reputation or sales, 579 U.S. at 131-32. Those are
 17 precisely the injuries that Maffick alleges it suffered as a result of Facebook's false representations
 18 about the origin of certain social media pages it publishes on its platform and Maffick's Lanham
 19 Act claim is therefore actionable. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S.
 20 23, 31-32 (2003) (Section 43(a) prohibits misrepresentations of the origin of goods or services,
 21 meaning their "source" or "producer," that "deceive consumers" or "impair a [plaintiff's]
 22 goodwill"); *accord Fish Kiss LLC v. North Star Creations, LLC*, 2018 WL 3831335 (D.N.J. Aug.
 23 13, 2018) (false assertion that defendant's products were "Made in USA" was actionable unfair
 24 competition under Section 43(a)).

25 Nevertheless, Maffick recognizes that the Court raised the issue of whether Maffick pled
 26 the elements of a Lanham Act claim because the Court had concerns about subject matter
 27 jurisdiction that it would need to resolve before addressing the merits of any other issue in this
 28 case. For those reasons, when Facebook approached Maffick about filing a motion to continue the

1 trial and stay discovery, Maffick agreed to compromise by suspending all deposition practice until
 2 after the Court ruled on Facebook's motion to dismiss and special motion to strike and also
 3 indicated its willingness to be flexible about the trial date once the Court had ruled. Maffick's
 4 paramount concern has always been presenting a complete record to the jury as soon as practicable,
 5 so that its claims can be deliberated and adjudicated on their merits. Maffick's belief was that by
 6 continuing with written discovery and document exchange, the parties could move the case forward
 7 while awaiting the Court's ruling. If the Court determines that it will exercise jurisdiction over the
 8 case, Maffick's position is that the parties should negotiate a reasonable schedule to complete fact
 9 and expert discovery and address the feasibility of the December trial date after the Court has ruled
 10 and clarified the issues on which the case will proceed.

11 Facebook's motion simply presumes too much. Before the Court rules on its jurisdictional
 12 inquiry or any of the issues that Facebook raised in its motions, the parties should be moving this
 13 matter forward toward a resolution on the merits. Maffick made a reasonable proposal that
 14 recognizes the significance of the Court's jurisdictional questions and addresses the burdens of
 15 discovery, while simultaneously not assuming the outcome of issues the Court has not yet decided.
 16 Toward that end, Maffick responded substantively to Facebook's written discovery – both
 17 interrogatories and requests for production – last week. Facebook, for its part, responded to
 18 Maffick's discovery solely with objections on the basis that it should not have to respond because it
 19 presumes it will prevail on its pending motions. Maffick respectfully submits that Facebook's
 20 position puts the cart before the horse and interferes with progress in a case that should be litigated
 21 on a timetable that enables Maffick to obtain timely relief on a dispute that threatens the core of its
 22 business – its reputation, the reach and monetization of its social media pages, and the ability to
 23 market products through e-commerce.

24 The Court should not stay discovery or continue the trial date at this point. Maffick has
 25 already agreed to relief that address Facebook's concerns on both those issues. Instead, the Court
 26 should deny Facebook's motion, recognizing that the parties have agreed to suspend deposition
 27 practice until after the pending motions are decided, and the Court should address the trial date
 28 after it decides the motions.

1
2 **III. CONCLUSION**
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4 For all these reasons, Facebook's motion to stay discovery and continue the trial date
5 should be denied.
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7 Dated: October 19, 2020
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9 TROYGOULD PC
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11 By: /s/ John C. Ulin
12 John C. Ulin
13 Attorneys for Plaintiff
14 MAFFICK LLC
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